

ONE HUNDRED FOURTEENTH CONGRESS

# Congress of the United States

## House of Representatives

### COMMITTEE ON ENERGY AND COMMERCE

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June 10, 2016

The Honorable Norman C. Bay  
Chairman  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

Dear Chairman Bay:

We write today seeking the perspectives of the Federal Energy Regulatory Commission (FERC or Commission) on the current and future state of the organized electricity markets you oversee pursuant to the authorities granted by Congress in the Federal Power Act.<sup>1</sup> As you know, the Committee has followed with keen interest the many market, regulatory, and technology changes currently affecting the electricity sector. Given the importance of electricity to our national security, our national economic interests and our basic health and welfare, both the Committee and the Commission have the critical responsibility of ensuring that, regardless of any present and future changes, consumers continue to receive reliable and affordable power.

The drivers behind these changes are well-documented – stringent new regulations on coal-fired power plants, the shale gas revolution, and generous subsidies and mandates that have decreased the cost of renewables. Increased deployment of energy efficient technologies, demand-side management programs, and distributed generation also have played a role, while an ever-increasing array of advanced grid technologies – energy storage, microgrids, electric vehicles, and rooftop solar – are beginning to make their mark. In addition, the adoption of “big data” analytics and new information technologies are beginning to offer a diverse suite of novel products and services that can identify and mitigate inefficiencies in the electricity supply chain.

The Committee is aware that consumer expectations are also changing. The availability of advanced, consumer-facing technologies in the electricity space are empowering consumers to make smarter decisions in energy usage, while providing utilities new, more efficient ways to

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<sup>1</sup> The Federal Energy Regulatory Commission, or FERC, is an independent agency that, among other duties, regulates the transmission and wholesale sales of electricity in interstate commerce and the markets that serve the electric needs of over two thirds of the nation. For more information see <http://www.ferc.gov/market-oversight/mkt-electric/overview.asp>

generate and distribute power. As consumer expectations and technology evolve, consideration of new business and regulatory models within the electricity sector is occurring – particularly at the state level – to better reflect changing market conditions.

As these changes occur, the competitive electricity markets – particularly the organized wholesale markets – continue to underachieve, a result of pervasive and persistent problems within their respective regulatory frameworks. We have previously communicated many of these concerns to the Commission, ranging from an inability to provide accurate price signals to a lack of fairness and transparency in governance structures and stakeholder processes. Despite continued best efforts by the Commission and among the independent system operators (ISOs) and regional transmission organizations (RTOS) to address these issues and adapt to changing market conditions, the restructured wholesale markets have, in many ways, become mere administrative constructs that are continuously “tweaked” through the regulatory process. Such inefficiencies have impeded the efficient deployment of capital and prevented consumers from realizing the potential benefits that competitive markets should yield. With some of the organized markets seemingly ill-equipped, and in the absence of comprehensive reform, it is difficult to see how these markets will be able to adapt to new market forces, technology advances, changing consumer expectations, and shifts in the regulatory and policy landscapes.

As further evidence of the evolution taking place – and perhaps evidence of the shortcomings of the current state of the organized markets and even the Federal Power Act itself – the Supreme Court has issued rulings on two recent and significant cases regarding the scope and reach of the Federal Power Act, the jurisdiction of the Commission, and how new products and programs fit into the existing statutory and regulatory regimes. In the matter of *Federal Energy Regulatory Commission v. Electric Power Supply Association*, decided on January 25, 2016, the Court upheld the Commission’s demand response program, finding that FERC has jurisdiction because the program directly affects wholesale rates. Similarly, in *Hughes v. Talen Energy Marketing, LLC*, decided on April 19, 2016, the Court determined that the Federal Power Act preempted Maryland’s program to self-supply in-state generation because the program intruded on FERC’s authority over interstate wholesale sales.

At the risk of oversimplifying, taken together these decisions affirm the traditional “bright line” of the Commission’s jurisdiction over products and practices that “directly affect” wholesale sales and rates, with the states reserving jurisdiction over retail matters. In doing so, the Court emphasized the limited applicability of its holdings, carefully choosing not to opine on whether other products, technologies, or programs may “directly affect” wholesale markets. But rather than providing greater clarity to future jurisdictional questions, we are concerned that, in an evolving electricity sector, distinguishing between wholesale and retail will become increasingly difficult, resulting perhaps in more litigation of this nature.

That the Court has been asked to answer these questions lends evidence to the notion that the electricity landscape is changing, with the potential to impact markets, blur jurisdictional boundaries, and prompt judicial intervention. Indeed, even in today’s competitive electricity markets it is difficult to argue that policies such as the Clean Power Plan, the federal wind production tax credit, state net metering policies, state subsidization of uneconomic resources, and state renewable portfolio mandates have not had, or will not have, a significant effect on wholesale prices and the generation profiles within the footprints of such markets. Whether such policies rise to the level of having a “direct affect” on wholesale markets for purposes of Federal

Power Act jurisdiction may increasingly become a question for the courts, as we have already witnessed.

Given the evolution of the electricity sector and the attendant challenges and opportunities presented, we believe participants in the electricity sector, as well as consumers, may be better served by Congress – rather than the courts – taking a more comprehensive review on many of these issues. We are not advocating for or intending to suggest that the Federal Power Act does or should give the Commission jurisdiction over such programs, incentives, or technologies; nor are we opining on the value of such programs. Rather, it is a recognition based on our observations that until we begin to comprehensively evaluate and address some of the broader market design, policy, technology and jurisdictional issues, the competitive electricity markets will continue to progress in fits and starts and, inevitably, such issues will be decided on a piecemeal basis through the courts.

As noted herein, the changes currently underway and the recent Supreme Court decisions raise numerous questions with respect to the future operation and regulation of the nation's electricity system. We therefore seek the Commission's perspectives and observations, with respect to the following threshold questions we are currently evaluating in our effort to better understand the current state of the electricity markets, in the context of the future evolution of the electricity sector:

1. Have the competitive markets fared as expected since restructuring began over 20 years ago, particularly in terms of market efficiency, capital investment, reliability, electricity rates, and consumer impacts?
2. Are the competitive markets equipped to promote, integrate, and adapt to new technologies, new products and services, and state and federal policy changes?
3. What is the Commission's view as to how non-FERC jurisdictional federal and state actions, such as the federal production tax credit or state renewable energy mandates, impact the operation of wholesale markets generally, and, specifically, in terms of impacts on reliability, resource and technology neutrality, and wholesale power prices?
4. How do new technologies, programs, incentives, and policy changes at the state and federal levels affect the jurisdictional "bright line"? Is that line becoming increasingly blurred as a result of such changes?
5. Does the Federal Power Act continue to be well-suited for today's electricity sector? Is it well-suited for the electricity system of the future?

In addition to your responses to the above questions, we also seek the Commission's technical assistance as the Committee seeks to provide a strong educational foundation for Members and set the stage for a more comprehensive review of the electricity markets in future Congresses. We appreciate your prompt attention to this request and hope that the Commission will be a willing and active participant in this effort.

Sincerely,



Fred Upton  
Chairman



Ed Whitfield  
Chairman  
Subcommittee on Energy & Power

Attachment

cc: The Honorable Cheryl A. LaFleur  
Commissioner, Federal Energy Regulatory Commission

The Honorable Tony Clark  
Commissioner, Federal Energy Regulatory Commission

The Honorable Colette D. Honorable  
Commissioner, Federal Energy Regulatory Commission

The Honorable Frank Pallone, Jr., Ranking Member

The Honorable Bobby L. Rush, Ranking Member  
Subcommittee on Energy and Power